The Bank of East Asia Ltd Singapore Branch v Axis Incorporation Bhd (No 1)

HIGH COURT (JOHOR BAHRU) — COMPANY WINDING UP NO (MT-1) 28–1 OF 2009
VERNON ONG JC
4 JUNE 2009

Companies and Corporations — Winding up — Provisional liquidator — Application to set aside ex parte order of appointment — Whether requirements under r 35(2) of the Companies (Winding-Up) Rules 1972 mandatory — Whether failure to comply with r 35(2) rendered order of appointment defective

Conflict of Laws — Foreign judgment — Enforcement — Petition based on judgment in default obtained from Singapore High Court — Whether failure to register judgment in Malaysia rendered petition premature and void — Reciprocal Enforcement of Judgments Act 1958 s 7

The respondent ('Axis') applied to set aside the ex parte order appointing a provisional liquidator of Axis pending disposal of the petition. Axis' application was founded on three principal grounds, inter alia, (i) the petitioner's failure to serve the ex parte summons in chambers on Axis in breach of rr 7(2) and 17(1) of the Companies (Winding-Up) Rules 1972 ('1972 Rules'); (ii) failure to register the foreign judgment and (iii) defect on the face of the ex parte order.

Held, allowing the application with costs:

(1) Section 231 of the Companies Act 1965 empowers a court to appoint a provisional liquidator at any time after presentation of a winding up petition. An application in this regard may be made ex parte. The contention of Axis was therefore without merit (see para 2(1)).

(2) The petition was founded upon a judgment in default obtained in the High Court in the Republic of Singapore, a foreign judgment. In order for such proceedings to be validly instituted, the foreign judgment must be registered in Malaysia pursuant to s 7 of the Reciprocal Enforcement

of Judgments Act 1958 ('REJA'). However, in the present case, the foreign judgment was not registered. Accordingly, no proceedings for the recovery of the judgment debt may be instituted in Malaysia. The petition was therefore premature and void and the proceedings could not be entertained for being in contravention of s 7 of the REJA; *Re Raju Jayaraman Kerpaya ex p Associated Asian Securities (Pte) Ltd* [1999] 5 CLJ 23; *Re Cheah Theam Swee ex p Equiticorp Finance Group Ltd & Anor* [1996] 2 SLR 76; *In re a Judgment Debtor (No 2176 of 1938)* [1939] 1 Ch 601 followed (see para 2(2)).

(3) Rule 35(2) of the 1972 Rules states that an order appointing a provisional liquidator shall state the nature and give a short description of the property of which the provisional liquidator is ordered to take possession. It is a mandatory provision and non-compliance thereof renders the order defective. On the facts, the ex parte order failed to state with sufficient particulars the nature and description of the property of which the provisional liquidator was ordered to take possession. In the circumstances, the failure to particularise the assets was fatal and rendered the ex parte order defective; *Ameriasa Tours & Travel Sdn Bhd v PJB Pacific Advisory Services Sdn Bhd* [2004] 2 CLJ 586 referred (see para 3).

[Bahasa Malaysia summary

Responden ('Axis') memohon untuk mengetepikan perintah ex parte melantik likuidator sementara bagi Axis, sementara menunggu pelupusan petisyen. Permohonan Axis didasarkan atas tiga alasan utama, antara lain, (i) kegagalan pempetisyen menghantar serah saman dalam kamar ex parte kepada Axis yang melanggar kk 7(2) dan 17(1) Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah 1972'); (ii) kegagalan mendaftarkan penghakiman asing dan (iii) kecacatan pada perintah ex parte tersebut.

Diputuskan, membenarkan permohonan dengan kos:

(1) Seksyen 231 Akta Syarikat 1965 memberikan kuasa kepada mahkamah untuk melantik likuidator sementara pada bila-bila masa selepas pengemukaan petisyen penggulungan. Suatu permohonan berkaitan boleh dibuat secara ex parte. Hujahan Axis oleh itu adalah tanpa merit (lihat perenggan 2(1)).

(2) Petisyen tersebut didasarkan kepada penghakiman ingkar yang diperoleh di Mahkamah Tinggi di Republik Singapura, suatu penghakiman asing. Untuk prosiding sedemikian dimulakan secara sah, penghakiman asing tersebut mesti didaftarkan di Malaysia menurut s 7

Akta Penguatkuasa Salingan Hukuman 1958 ('APSH'). Walau bagaimanapun, di dalam kes ini penghakiman asing tersebut tidak didaftarkan. Oleh itu, prosiding untuk pengembalian hutang penghakiman tidak boleh dimulakan di Malaysia. Petisyen tersebut oleh itu adalah pramasa dan batal dan tidak boleh dilayan kerana bertentangan dengan s 7 APSH; *Re Raju Jayaraman Kerpaya ex p Associated Asian Securities (Pte) Ltd* [1999] 5 CLJ 23; *Re Cheah Theam Swee ex p Equiticorp Finance Group Ltd & Anor* [1996] 2 SLR 76; *In re a Judgment Debtor (No 2176 of 1938)* [1939] 1 Ch 601 diikut (lihat perenggan 2(2)).

(3) Kaedah 35(2) Kaedah-Kaedah 1972 menyatakan bahawa sesuatu perintah yang melantik likuidator sementara perlu menyatakan sifat dan memberikan gambaran singkat mengenai harta yang likuidator sementara diperintahkan mengambil milik. Ia adalah peruntukan mandatori dan ketidakpatuhannya menjadikan perintah tersebut cacat. Di atas fakta, perintah ex parte tersebut gagal menyatakan dengan butir-butir yang mencukupi sifat dan gambaran mengenai harta yang mana pelikuidasi sementara diperintahkan mengambil milik. Dalam keadaan tersebut kegagalan menyenaraikan aset-aset adalah menjejaskan dan menjadikan perintah ex parte tersebut cacat; *Ameriasa Tours & Travel Sdn Bhd v PJB Pacific Advisory Services Sdn Bhd* [2004] 2 CLJ 586 dirujuk (lihat perenggan 3).]

Notes

For cases on enforcement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1678–1684.

For cases on provisional liquidator, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1490–1494.

Cases referred to

A Judgment Debtor (No 2176 of 1938), In re [1939] 1 Ch 601, CA (folld)

Ameriasa Tours & Travel Sdn Bhd v PJB Pacific Advisory Services Sdn Bhd [2004] 2 CLJ 586, HC (refd)

Cheah Theam Swee, Re; ex p Equiticorp Finance Group Ltd & Anor [1996] 2 SLR 76, HC (folld)

Emporium Jaya (Bentong) Sdn Bhd (In liquidation) v Emporium Jaya (Jerantut) Sdn Bhd [2002] 1 MLJ 182, HC (refd)

Intrakota Komposit Sdn Bhd & Anor v Sogelease Advance (M) Sdn Bhd [2004] 8 CLJ 276, HC (refd)

Lim Szu Ang, Re; ex p Kewangan Utama Bhd [2005] 7 MLJ 487; [2005] 7 CLJ 23, HC (refd)

Pui Chiau Tien v Foi Chaw Leong & Anor [2004] 5 CLJ 145, HC (refd) A
Raju Jayaraman Kerpaya, Re; ex p Associated Asian Securities (Pte) Ltd [1999] 5 CLJ 23, HC (folld)

Legislation referred to

Companies Act 1965 s 231 B
Companies (Winding-Up) Rules 1972 rr 7, 7(2), 17(1), 35(2)
Reciprocal Enforcement of Judgments Act 1958 s 7

Wong Rhen Yen (Leslie Looi with him) (Dennis Nik & Wong) for the petitioner.
Wong Kim Fatt (Cheah Sin Chin with him) (Gulam & Wong) for the respondent. C

Vernon Ong Lam Kiat JC:

[1] By a summons in chambers in encl 17, the respondent, Axis Incorporation Bhd ('Axis') applied to set aside the ex parte order appointing a provisional liquidator of Axis pending disposal of the petition. The ex parte order was granted on 19 February 2009 on the hearing of an ex parte summons in chambers filed by The Bank of East Asia Ltd Singapore Branch ('BEA'). Axis' application is founded on three principal grounds: D E

(1) BEA's failure to serve the ex parte summons in chambers on Axis in breach of rr 7(2) and 17(1) of the Companies (Winding-Up) Rules 1972 ('1972 Rules');

(2) failure to register the foreign judgment; and F

(3) defect on the face of the ex parte order.

[2] After hearing of learned counsel for Axis and BEA respectively, the court made the following findings: G

(1) Section 231 of the Companies Act 1965 empowers a court to appoint a provisional liquidator at any time after presentation of a winding up petition. An application in this regard may be made ex parte (see *Emporium Jaya (Bentong) Sdn Bhd (In liquidation) v Emporium Jaya (Jerantut) Sdn Bhd* [2002] 1 MLJ 182). The contention of learned counsel for Axis is without merit. H

(2) The petition is founded upon a judgment in default dated 21 November 2008 obtained in the High Court in the Republic of Singapore (see para 6 of the petition). The judgment in question is a foreign judgment. As the petition is made upon a demand for a judgment debt (see s 218 of the notice), the winding up proceedings are made with the view of recovering the judgment debt (see the analogy with bankruptcy proceedings in *Re Lim Szu Ang, ex p Kewangan Utama* I

Bhd [2005] 7 MLJ 487 at p 491; [2005] 7 CLJ 23 at pp 27–28; *Intrakota Komposit Sdn Bhd & Anor v Sogelease Advance (M) Sdn Bhd* [2004] 8 CLJ 276). In order for such proceedings to be validly instituted, the foreign judgment must be registered in Malaysia pursuant to s 7 of the Reciprocal Enforcement of Judgments Act 1958 ('REJA'). In this case the foreign judgment was not registered. Accordingly, no proceedings for the recovery of the judgment debt may be instituted in Malaysia. The petition is therefore premature and void and the proceedings cannot be entertained for being in contravention of s 7 of the REJA (see *Re Raju Jayaraman Kerpaya ex p Associated Asian Securities (Pte) Ltd* [1999] 5 CLJ 23 at pp 29–30; *Re Cheah Theam Swee, ex p Equiticorp Finance Group Ltd & Anor* [1996] 2 SLR 76 at p 83; *In re a Judgment Debtor (No 2176 of 1938)* [1939] 1 Ch 601 at pp 607–608).

(3) Rule 35(2) of the 1972 Rules state that an order appointing a provisional liquidator shall state the nature and give a short description of the property of which the provisional liquidator is ordered to take possession. This is a mandatory provision so that non-compliance thereof renders the order defective (see *Pui Chiau Tien v Foi Chaw Leong & Anor* [2004] 5 CLJ 145). The ex parte order failed to state with sufficient particulars the nature and description of the property of which the provisional liquidator is ordered to take possession. In this case, the description is vague and too general as it encompasses practically all of the assets of Axis. The particulars of the assets of Axis could have been easily procured from Axis' annual report but this was not done. The ex parte order did not state or itemise the assets of Axis, particularly those which may be in jeopardy. It further did not state with any particulars the assets to be placed in the hands of the provisional liquidator. Instead, there is a general description in the nature of 'all property' as set out in para 1.2 of the ex parte order. Clearly, this is not sufficient. In the circumstances, the failure to particularise the assets is fatal and renders the ex parte order defective (see *Ameriasa Tours & Travel Sdn Bhd v PJB Pacific Advisory Services Sdn Bhd* [2004] 2 CLJ 586).

[3] For the foregoing reasons, the court granted an order in terms of Axis application in prayers (a), (b), (c) and (d) with costs to be taxed unless otherwise agreed.

Application allowed with costs.

Reported by M Sivabarathi